

Chapter VIII

EXPERT REVIEWER PROGRAM

A. Overview of Function and Updated Data

In a quality of care disciplinary matter against a physician, expert opinion testimony is required to prove or disprove that the physician performed in accordance with the prevailing standard of care.¹⁵⁸ Because the burden of proof is on the Board, it must produce one or more physician witnesses with experience and expertise in the specialty or procedure at issue. That expert witness must review all the evidence in the case, testify to the standard of care applicable to each procedure performed, opine as to whether the subject physician's conduct departed from that standard of care and to what degree, and explain the justification or basis for his opinion. This burden requires MBC to recruit, train, and select expert witnesses who are willing to review disciplinary investigations against other physicians, write detailed memoranda and opinions, and — if necessary — testify orally at an evidentiary hearing.

As described in detail in the *Initial Report*,¹⁵⁹ the Medical Board overhauled its Expert Reviewer Program in 1994, adopting minimum qualifications for expert reviewers¹⁶⁰ and establishing procedures for the appointment, training, oversight, evaluation, and reappointment of a pool of expert reviewers who would be available when investigations reach a point where independent and objective expert input is essential. In the past decade, MBC's Expert Reviewer Program has recruited and trained a list of approximately 900 expert reviewers in all specialties throughout the state. The Board recruits experts in a variety of ways, but primarily through its *Action Report* licensee newsletter, speeches and presentations made by Board members and staff to hospital

¹⁵⁸ *Hanson v. Grode* (1999) 76 Cal. App. 4th 601, 606–07; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal. 4th 992, 1001.

¹⁵⁹ *Initial Report*, *supra* note 13, at 155–59.

¹⁶⁰ MBC generally requires its experts to have a current California license in good standing, with no prior discipline, no pending accusation, no current complaints, and no complaints closed within the past five years for insufficient evidence. They must be board certified in a specialty approved by the American Board of Medical Specialties and must have at least three years of experience (beyond board certification) in that specialty. Additionally, MBC expert reviewers must be actively practicing medicine or, if retired, not more than two years out of practice.

personnel and medical societies, and recruitment efforts by district office medical consultants in their local communities.

The *Initial Report* also described methods by which MBC investigators, medical consultants, and HQE DAGs evaluate the performance of experts in reviewing records, drafting well-reasoned expert opinions, and — if applicable — testifying at hearings. Further, since July 2003, MBC's experts have been invited to evaluate their experience as an expert and provide feedback directly to the Chair of MBC's Enforcement Committee. Through this mutual evaluation process, Board staff is better able to determine whether to reuse a given expert in a future proceeding,¹⁶¹ and experts provide invaluable feedback to the Board about their experience with the process, MBC staff, HQE DAGs, and ways in which MBC can better attract, train, and retain qualified experts.

B. The Monitor's Findings and MBC/Legislative Responses

The following summarizes the Monitor's *Initial Report* findings and concerns about MBC's Expert Reviewer Program, and documents the responses to those findings implemented by the Medical Board, the Attorney General's Office, and the Legislature during 2005.

1. Average expert reviewer times are excessive.

Once an expert is chosen for a given case, the investigator and medical consultant — sometimes assisted by the DIDO DAG in the district office — assemble the investigative file, medical records, and other documentary evidence, determine which materials to forward to the expert, and send the package to the expert with a cover letter. Experts are expected to review the materials, draft a memorandum in a specified format,¹⁶² and return the file within 30 days. In the *Initial Report*, however, the Monitor found that the average 2003–04 turnaround time for expert opinions was 69 days.¹⁶³ According to recent data from the Expert Reviewer Program, the average turnaround time in 2004–05 was also 69 days — over two times MBC's goal.

¹⁶¹ In the *Initial Report*, the Monitor commented on the fact that MBC has no standards or policy on the reuse of experts. *Initial Report, supra* note 13, at 159. In February 2005, MBC Enforcement Chief Joan Jerzak announced a new policy governing expert reuse. Once a given expert is used five times within a 12-month period, his/her name is flagged on MBC's expert witness database, and investigators and medical consultants are encouraged to seek an alternative expert.

¹⁶² The expert opinion must (1) describe the records reviewed; (2) summarize the case; (3) state the standard of care at the time of the event(s) in question; (4) determine if the care in question was or was not a deviation from the standard of practice; (5) define the deviation from the standard in terms of no departure, simple departure, or extreme departure; and (6) summarize the review.

¹⁶³ *Initial Report, supra* note 13, at 160.

Quality of care cases are often complex and involve boxes of medical records and other evidence. Most California physicians who provide expert review services to MBC are actively practicing medicine, and they must find time to provide services to MBC outside their busy practices. MBC is able to pay only \$100 per hour for records review and report preparation, and \$200 per hour for testimony at hearings. MBC's experts know that physicians who testify for the defense or in civil malpractice proceedings are routinely paid \$500–\$750 per hour, depending on the specialty, and properly view their work for MBC as community service. On their evaluation forms, MBC's experts state that it is often difficult to find time to review investigatory files and draft opinions within the time constraints of their busy practices. Although MBC could never pay these physicians the equivalent of what they earn in medical practice, a growing number of experts indicate that MBC should attempt to increase the hourly rates for experts. In 2003–04, 49% of the physicians who returned MBC's expert reviewer survey said they weren't paid enough for their services.¹⁶⁴ In 2004–05, 51% of the 250 physicians who responded to the survey stated that MBC's hourly rate is not high enough. If the fee increase in SB 231 can accommodate an increase in the hourly rate paid for records review and report preparation, MBC should consider it as it may assist in the recruitment of qualified experts — who are essential to the Board's ability to prove a quality of care case — and may prompt experts to review cases in a more timely fashion.

2. There is a lack of qualified experts in many specialties, and the CCU specialty review requirement is siphoning off some experts who would otherwise review cases in the field.

In the *Initial Report*, the Monitor noted that MBC lacks a sufficient number of experts in certain subspecialties, and that some of those experts are now being utilized by the Central Complaint Unit for the specialty review required by Business and Professions Code section 2220.08. In Recommendation #32, the Monitor suggested that MBC undertake a vigorous recruitment effort and that — resources permitting — it should consider reinstating in-person training sessions for expert reviewers. During 2003–04, veteran MBC investigators told us that, in years past, district office supervisors, medical consultants, and DAGs conducted training sessions for experts in which they would review examples of well-written expert reports, discuss the guidelines for writing an expert report, and answer the experts' questions. According to the investigators, these training sessions served to enhance the quality of the experts' work and promoted a collegial relationship between MBC/HQE personnel and the experts — which in turn encouraged retention of qualified experts.

During 2005, MBC enforcement staff has engaged in a concerted effort to recruit expert reviewers whenever they give presentations to physician groups and organizations. Further, the

¹⁶⁴ *Id.* at 162.

Expert Reviewer Program analyst has identified specialties and subspecialties in which MBC lacks a sufficient number of experts — including dermatology, neurosurgery (especially spine surgery), pediatric surgery, pediatric cardiology, and gastric bypass surgery — and has engaged in a targeted outreach effort to hospital administrators and individual physicians in these specialties. Finally, MBC’s enforcement chief drafted an article on the role of physicians in MBC investigations for publication in the October 2005 issue of the Board’s *Action Report* licensee newsletter.

Additionally, MBC and HQE staff have reinstituted in-person training sessions for expert reviewers which have been held in MBC district offices all over the state. These two-hour sessions¹⁶⁵ include separate presentations by a supervising investigator, a medical consultant, and a deputy attorney general. The sessions cover a range of material designed to supplement the expert reviewer guidelines and the videotaped presentation that are mailed to each expert at the start of his/her two-year tenure. In the training sessions, MBC and HQE staff place special emphasis on the all-important expert opinion to ensure that the experts understand how it must be drafted, how it is used, and how it may result in the filing of administrative charges and become subject to scrutiny and cross-examination.

3. There is no requirement that expert testimony be reduced to writing and/or exchanged before the hearing.

In the *Initial Report*, the Monitor explained that MBC requires its experts to reduce their expert opinions to writing — and under the Administrative Procedure Act (APA), those written expert opinions are discoverable by the defense as soon as an accusation is filed. However, defense counsel frequently instruct their experts not to reduce their opinions to writing. Because of the APA’s limitations on discovery in administrative proceedings (and especially its limitations on witness depositions), the HQE DAG frequently has no idea of the substance of defense counsel’s expert opinion until that expert takes the stand at the evidentiary hearing. This practice results in the unfair “sandbagging” of the DAG at the hearing, and stifles the possibility of prehearing settlement. While defense counsel may perceive some short-term adversarial advantage in depriving the trial DAG of full knowledge of the weaknesses of MBC’s case, litigation surprise over expert testimony is very costly to respondents, as it often means unnecessary trial preparation and hearing expenses because potential early case dispositions — including possible dismissals of accusations — cannot take place (in the absence of expert views raising doubts about MBC’s case). This surprise is equally costly to MBC and the public, as scarce investigator and attorney resources are often allocated to preparation and trial of matters which could have been resolved more expeditiously. In

¹⁶⁵ During 2005, expert reviewer training sessions were held on March 24 and April 18 in Glendale, May 19 in Valencia, June 21 in Tustin, June 27 in San Diego, June 29 in Pleasant Hill (two sessions), and September 28 in Santa Monica.

Recommendation #30, the Monitor urged that the Medical Practice Act be amended to provide that any party to a Medical Board enforcement matter that wishes to rely on expert testimony must reduce that testimony to writing and provide it to the other party well in advance of the hearing.

SB 231 (Figueroa) adds new section 2334 to the Business and Professions Code, which requires a party to a Medical Board disciplinary proceeding who wishes to rely on expert testimony to exchange certain information in writing with counsel for the other party: (1) a curriculum vitae of the expert; (2) a brief narrative statement of the general substance of the testimony that the expert is expected to give, including any opinion testimony and its basis; (3) a representation that the expert has agreed to testify at the hearing; and (4) a statement of the expert's hourly and daily fee for providing testimony and consultation. The exchange of this information must occur at least 30 days prior to the commencement of the administrative hearing or as ordered by the administrative law judge. The Office of Administrative Hearings is authorized to adopt regulations to implement section 2334.

4. The expert reviewer handbook contained errors.

In the *Initial Report*, the Monitor noted that MBC's *Expert Reviewer Manual* provided to the Monitor team in 2003 had not been revised to conform to the changes in 2002's SB 1950 (Figueroa) and contained several legal errors. That manual was revised and corrected in late 2004.

C. Recommendations for the Future

■ ***Increased expert reviewer hourly rates for records review and report preparation.*** If the fee increase in SB 231 can accommodate an increase in the hourly rate paid to Medical Board experts for records review and report preparation, MBC should consider it as it may assist in the recruitment of qualified experts — who are essential to the Board's ability to prove a quality of care case — and may prompt experts to review cases in a more timely fashion.

